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EXAMINER

KUBELIK, ANNE R

ART UNIT

PAPER NUMBER

1638

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8

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/993,856

Applicant(s)

JAHN, MARGARET M.

Examiner

Anne R. Kubelik

Art Unit

1638

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 18 April 2002 and 04 April 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-73 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-73 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6,7,1.5.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### DETAILED ACTION

1. Claims 1-73 are pending.
2. Paper No. 5 filed 18 April 2002 amended the specification. Applicant stated that no new matter was introduced by the amendment but did not point to any support for it. It is noted that support for the change of the recessive GBS resistance gene from *Gsb1* to *gsb3* is found on at least pg 28, lines 25-32 and claims 8-9.

### *Claim Rejections - 35 USC § 112*

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claims 1, 3-5, 22, 24-26, 45, 47-49 and 67-73 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter that was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The claims are directed to a method of using the specific *Cucumis melo* plants Cornell ZPPM 339, TAM Uvalde, UC Topmark, Oro Rico, Galia type, Ananas type, PI 157082, PI 511890, PI 482399, PI 482398 and PI 140471, and to a plant line designated NY 01-190-3R, -7L, -9L. Since the plants are essential to the claimed invention, they must be obtainable by a repeatable method set forth in the specification or otherwise be readily available to the public. If a plant is not so obtainable or available, a deposit of seed thereof may satisfy the requirements of

Art Unit: 1638

35 U.S.C. 112. The specification does not disclose a repeatable process to obtain the exact same seed in each occurrence and it is not apparent if such seed is readily available to the public.

It is noted that Applicant intends to deposit seeds for one of the lines, NY 01-190-3R, -7L, -9L, at the ATCC, but there is no indication that the seeds have been deposited and there is no indication in the specification as to public availability.

If the deposit of these seeds is made under the terms of the Budapest Treaty, then an affidavit or declaration by the Applicant, or a statement by an attorney of record over his or her signature and registration number, stating that the seeds will be irrevocably and without restriction or condition released to the public upon the issuance of a patent would satisfy the deposit requirement made herein. A minimum deposit of 2500 seeds is considered sufficient in the ordinary case to assure availability through the period for which a deposit must be maintained.

If the deposit has not been made under the Budapest Treaty, then in order to certify that the deposit, meets the criteria set forth in 37 CFR 1.801-1.809, Applicant may provide assurance of compliance by an affidavit or declaration, or by a statement by an attorney of record over his or her signature and registration number showing that

(a) during the pendency of the application, access to the invention will be afforded to the Commissioner upon request;

(b) all restrictions upon availability to the public will be irrevocably removed upon granting of the patent;

(c) the deposit will be maintained in a public depository for a period of 30 years or 5 years after the last request or for the enforceable life of the patent, whichever is longer;

(d) the viability of the biological material at the time of deposit will be tested (see 37 CFR 1.807); and

(e) the deposit will be replaced if it should ever become inviable.

5. Claims 1-66 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter that was not described in the specification in such a way as to reasonably convey to one

Art Unit: 1638

skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The claims are drawn to *C. melo* plants and methods of producing *C. melo* plants that involve unidentified parent plants and in claims 19-21 an indeterminate number of generations and parent plants, wherein it remains unclear what the identity of the plants in each of the steps would be, much less what the resultant product plant would be. Neither the plants required by each of the steps, nor the plants that are produced by the process are defined by genomic structure or by phenotypic characteristics, and therefore, the claimed invention lacks an adequate written description.

The claims are also broadly drawn to plants comprising a *Gsb1*, *Gsb2*, *gsb3*, *Gsb4* or *Gsb5* resistance gene. The specification does not describe the structural features that distinguish these genes from other nucleic acids.

See *Univ. of California v. Eli Lilly*, 119 F.3d 1559, 43 USPQ 2d 1398 (Fed. Cir. 1997):

The name cDNA is not in itself a written description of that DNA; it conveys no distinguishing information concerning its identity. While the example provides a process for obtaining human insulin-encoding cDNA, there is no further information in the patent pertaining to that cDNA's relevant structural or physical characteristics; in other words, it thus does not describe human insulin cDNA .... Accordingly, the specification does not provide a written description of the invention ....

and at pg 1406:

a generic statement such as "vertebrate insulin cDNA" or "mammalian insulin cDNA," without more, is not an adequate written description of the genus because it does not distinguish the genus from others, except by function. It does not specifically define any of the genes that fall within its definition. It does not define any structural features commonly possessed by members of the genus that distinguish them from others. One skilled in the art therefore cannot, as one can do with a fully described genus, visualize or recognize the identity of the members of the genus. A definition by function, as we have previously indicted, does not suffice to define the genus because it is only an indication of what the genes does, not what it is.

See *Amgen Inc. v. Chugai Pharmaceutical Co. Ltd.*, 18 USPQ 2d 1016 at page 1021:

A gene is a chemical compound, albeit a complex one, and ... conception of a chemical compound requires that the inventor be able to define it so as to distinguish it from other materials .... Conception does not occur unless one has a mental picture of the structure of the chemical or is able to define it by its method of preparation, its

Art Unit: 1638

physical or chemical properties, or whatever characteristics sufficiently distinguish it. It is not sufficient to define it solely by its principal biological property, e.g., encoding human erythropoietin, because an alleged conception having no more specificity than that is simply a wish to know the identity of any material with that biological property.

Therefore, given the lack of written description in the specification with regard to the structural and physical characteristics of the claimed compositions, one skilled in the art would not have been in possession of the genus claimed at the time this application was filed.

6. Claims 1, 6-17, 27-38 and 50-61 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter that was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The claims are broadly drawn to methods of producing gummy blight resistant *C. melo* seed by crossing plants that have the resistance genes *Gsb1*, *Gsb2*, *Gsb4*, *Gsb5* or *gsb3*, and seed and plants thereby produced.

The instant specification, however, only provides guidance for identifying gummy blight resistant *C. melo* accessions, including PI 157082, PI 551890, PI 482399, PI 482398 and PI 140471 (examples 1 and 4-6); crossing and backcrossing PI 140471, PI 157082 and PI 551890 to each other and to Cornell ZPPM 339 (example 3); evaluating the progeny for gummy blight resistance and analysis of the results to show that PI 157082 and PI 551890 have a different resistance gene than does PI 140471 or each other (examples 7-9); PI 157082 has the resistance gene *Gsb2* and PI 551890 has the resistance gene *Gsb4*. The specification also mentions that PI 157082, PI 551890, PI 482399, PI 482398 and PI 140471 were used with Cornell ZPPM 339, TAM Uvalde, UC Topmark, Oro Rico, Galia type, Ananas type and other *C. melo* varieties in a plant breeding program, but none of the crosses are detailed (example 11). The specification

Art Unit: 1638

states that PI 482398 has the resistance gene *Gsb5* and PI 482399 has the resistance gene *gsb3* and that five resistance genes are separate and distinct from one another (pg 28).

The instant specification fails to provide guidance for resistance genes *Gsb1*, *Gsb2*, *Gsb4*, *Gsb5* and *gsb3*. The sequences of the genes are not provided. Methods of distinguishing those genes from other gummy blight resistance genes and methods of distinguishing the genes from each other are not provided, with the least amount of information provided for *Gsb5* and *gsb3*.

There is no evidence that any of these the resistance genes are individual genes and not actually closely linked genes. In *Arabidopsis*, the resistance genes RPP14.1 and RPP14.2 are linked by <0.05 cM (Reignault et al, 1996, Mol. Plant Microbe Interact. 8:464-473; see the abstract). The numbers of progeny analyzed in Table 2 of the instant specification would not have detected linkages this close.

Given the claim breath, unpredictability, and lack of guidance as discussed above, undue experimentation would have been required by one skilled in the art to develop and evaluate methods of producing gummy blight resistant *C. melo* seed by crossing plants that have the resistance genes *Gsb1*, *Gsb2*, *Gsb4*, *Gsb5* or *gsb3*, and seed and plants thereby produced.

Given the claim breath, unpredictability in the art, and lack of guidance in the specification as discussed above, the instant invention is not enabled.

7. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Art Unit: 1638

8. Claims 19-21, 42, 44, 64 and 66-73 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that Applicant regards as the invention. Dependent claims are included in all rejections.

Claims 19-21 are indefinite because there are no clear positive method steps. The method step "using germplasm" in claim 19 does not recite clearly defined positive method steps. The method steps of the traditional plant breeding techniques in claim 20 and the tissue culture techniques of claim 21 are also not clearly defined. It is uncertain for each of the recited techniques what steps they would be comprised of, how many generations of crosses would be incorporated in the method, and what parent plants would be used for each cross.

Claims 42, 64, 71 and 73 are indefinite in their recitation of "capable of expressing". It is not clear if the plant actually does express all these characteristics. It is suggested that the phrase be replaced with --having--.

In claims 42, 64 and 71 it is unclear how tissue can regenerate plants; plants can, however, can be regenerated from tissue.

Claims 44 and 66 are indefinite in their recitation of "at least one ancestor of said offspring". It is unclear how many generations ago the plant of claim 39 was the ancestor and what other plants were used to create the claimed plant.

Claim 67 is indefinite in its recitation of "(composite)". It is unclear what this term means. Does it mean that the breeding line NY 01-190-3R, -7L, -9L is not composed of genetically uniform plants but is a mixture, or "composite", of genetically different plants? If that is the case, have 2500 seeds of each genotype been deposited?



***Claim Rejections - 35 USC § 102***

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. Claims 1-2, 4-8, 10-12, 14-16, 18-20, 22-23, 25-29, 31-33, 35-37, 39-41, 43-46, 48-52, 54-56, 58-60, 62-63 and 65-66 are rejected under 35 U.S.C. 102(b) as being anticipated by each of Prasad et al (1967, Amer. Hort. Sci. 91:396-400) and Norton et al (1989, HortSci. 24:709-711) taken with the evidence of the instant specification.

Prasad et al teach a method of producing gummy blight resistant *C. melo* hybrid seed by crossing gummy blight resistant *C. melo* plants to resistant and non-resistant *C. melo* plants, and seeds and plants thereby obtained (pg 397-399 and Tables 1-5). The method steps used include crossing the two parent plants, growing the first generation hybrid seed to yield first generation resistant hybrid plants (table 2) and backcrossing the hybrid plants to produce seed and offspring plants from that seed (table 4), which would constitute "using germplasm derived from the hybrid plant in a plant breeding program". The parent plants include PI 140471 (referred to as P-1 in the tables, see legend to Table 1), which inherently has the dominant resistance gene *Gsb1* (see Prasad et al, pg 399, paragraph 2 and the instant specification, pg 25, lines 4-11). The susceptible cultivars used are muskmelons, (pg 397, paragraph 2), which the instant specification teaches belongs to *C. melo cantalupensis* (pg 1, lines 26-27). The parent plants taught by Prasad et al also include plants with moderate resistance conferred by dominant genes (pg 399,

Art Unit: 1638

paragraph 2). Prasad et al also teach crossing the resulting hybrid plants to resistant and susceptible plants (Table 4). Plants regenerated from tissue culture of any of the plants taught by Prasad et al would inherently be identical to the plants taught by Prasad et al.

Norton et al teach a method of producing gummy blight resistant *C. melo* hybrid seed by crossing gummy blight resistant PI 140471 *C. melo* plants to the non-resistant plant Georgia 47, and seeds and offspring plants thereby obtained (Fig. 1). PI 140471 inherently has the dominant resistance gene *Gsb1*, as discussed above. Crossing of subsequent generations involves crossing of two resistant plants and backcrossing (Fig. 1), which would constitute "using germplasm derived from the hybrid plant in a plant breeding program". Plants regenerated from tissue culture of any of the plants taught by Norton et al would inherently be identical to the plants taught by Norton et al. Georgia 47 is a muskmelon (Table 1), which the instant specification teaches belongs to *C. melo cantalupensis* (pg 1, lines 26-27).

11. Claims 1-8, 10-12, 14-16, 18-20, 22-29, 31-33, 35-37, 39-41, 43-52, 54-56, 58-60, 62-63 and 65-66 are rejected under 35 U.S.C. 102(a) as being anticipated by Zuniga et al (1999, Plant Dis. 83:1105-1107) taken with the evidence of the instant specification.

Zuniga et al teach a method of producing gummy blight resistant *C. melo* hybrid seed by crossing gummy blight susceptible ZPPM 339 to each of PI 140471, PI 157082 and PI 511890 and seeds and offspring plants thereby obtained (Table 2). The method steps used include crossing the two parent plants, growing the first generation hybrid seed to yield first generation resistant hybrid plants and backcrossing the hybrid plants to produce seed and offspring plants from that seed, which would constitute "using germplasm derived from the hybrid plant in a plant breeding program". Plants regenerated from tissue culture of any of the plants taught by

Art Unit: 1638

Zuniga et al would inherently be identical to the plants taught by Zuniga et al. ZPPM 339 is a muskmelon (pg 1105, column 3, paragraph 2), which the instant specification teaches belongs to *C. melo cantalupensis* (pg 1, lines 26-27). The instant speciation teaches that PI 140471 inherently has the *Gsb1* gene, PI 157082 inherently has the *Gsb2* gene, and PI 511890 inherently has the *Gsb4* gene (pg 25, lines 4-11, and pg 26, lines 24-26).

***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 1-20, 22-41, 43-63 and 65-66 are rejected under 35 U.S.C. 103(a) each of Prasad et al (1967, Amer. Hort. Sci. 91:396-400) and Norton et al (1989, HortSci. 24:709-711) in view of each of Kalb et al (1984, J. Amer. Hort. Sci. 109:411-415) and Zhang et al (1997, HortSci. 32:117-121) and Applicant's admission.

The claims are drawn to methods of producing gummy blight resistant *C. melo* hybrid seed by crossing gummy stem blight resistant *C. melo* plants to resistant and non-resistant ones, and seeds and plants thereby obtained. The claims are also drawn to the use of the non-resistant variety UC Topmark and the resistant varieties PI 140471, PI 157082, PI 511890, PI 482398 and PI 482399 in the crosses.

The teachings of each of Prasad et al and Norton et al are discussed above. Neither Prasad et al nor Norton et al disclose use of the varieties UC Topmark, PI 157082, PI 511890, PI

Art Unit: 1638

482398 or PI 482399 in the crosses.

Kalb et al teach the fruit quality characteristics of UC Topmark and other *C. melo* muskmelon varieties (Tables 1 and 3-4).

Zhang et al teach the resistance of a number of *C. melo* varieties, including PI 140471, PI 157082, PI 511890, PI 482398, PI 482399 and Topmark, to gummy blight (Tables 1 and 2). PI 140471, PI 157082, PI 511890, PI 482398 and PI 482399 were identified as having high levels of resistance (abstract)

The instant specification teaches that PI 140471, PI 157082, PI 511890, PI 482398 and PI 482399 have the Applicant-defined gummy stem blight resistance genes *Gsb1*, *Gsb2*, *Gsb4*, *Gsb5* and *gsb3*, respectively (pg 28, lines 28-30).

At the time the invention was made, it would have been obvious to one of ordinary skill in the art to modify the method of producing gummy blight resistant *C. melo* hybrid seed taught by each of Prasad et al and Norton et al, to use the *C. melo* varieties described in each of Kalb et al and Zhang et al. One of ordinary skill in the art would have been motivated to do so because of the fruit qualities that a line like UC Topmark and other *C. melo* varieties could bring to breeding programs (Kalb et al, pg 413, paragraph spanning the columns) and because use of gummy blight resistance lines other than PI 140471 could breed melons with higher gummy stem blight resistance (Zhang et al, pg 117, column 2, paragraph 1). Zhang et al also suggest using the lines they have identified as having resistance in breeding programs (pg 120, column 3, paragraph 4).

14. Claims 1, 4-8, 10-12, 14-16, 18-22, 25-29, 31-33, 35-37, 39-45, 48-52, 54-56, 58-60 and 62-66 are rejected under 35 U.S.C. 103(a) as being obvious over each of Prasad et al (1967,

Amer. Hort. Sci. 91:396-400) and Norton et al (1989, HortSci. 24:709-711) in view of Trulson et al (1986, Plant Science 4:35-43).

The claims are drawn to methods of producing gummy blight resistant *C. melo* hybrid seed by crossing gummy stem blight resistant *C. melo* plants to resistant and non-resistant ones, and seeds and plants thereby obtained. The method includes tissue culture techniques in the breeding program, and the claims are also drawn to tissue cultures of the plants.

The teachings of each of Prasad et al and Norton et al are discussed above. Neither Prasad et al nor Norton et al disclose the use of tissue culture techniques in the breeding program or tissue culture of the plants they produced.

Trulson et al teach tissue culture and plant regeneration in *C. melo* (pg 39, right column, paragraph 3)

At the time the invention was made, it would have been obvious to one of ordinary skill in the art to modify the method of producing gummy blight resistant *C. melo* hybrid seed as taught by each of Prasad et al and Norton et al, to use tissue culture techniques as described in Trulson et al in the breeding program. One of ordinary skill in the art would have been motivated to do so because of the importance of tissue culture techniques in plant breeding (Trulson et al, pg 42, right column, paragraph 3).

#### ***Claim Rejections - 35 USC § 102 - 35 USC § 103***

15. Claims 67-73 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103 as obvious over each of Prasad et al (1967, Amer. Hort. Sci. 91:396-400) and Norton et al (1989, HortSci. 24:709-711).

Art Unit: 1638

The plants of the instant application, NY 01-190-3R, -7L, -9L, and the plants taught by each of Prasad et al and Norton et al have the same trait, resistance to gummy blight (see Prasad et al, Table 3-4, and Norton et al, Fig. 1 and Table 1). Thus, the NY 01-190-3R, -7L, -9L plants appear to be identical to the prior art plants.

Alternatively, if the claimed plants, seeds and tissues of the instant invention are not identical to the plants and seeds taught by each of Prasad et al and Norton et al, then it appears that the plants and seeds taught by each of Prasad et al and Norton et al only differ from the claimed plants and seeds due to minor morphological variation, wherein said minor morphological variation would not confer a patentable distinction to NY 01-190-3R, -7L, -9L plants. Thus, the claimed invention was *prima facie* obvious as a whole to one of ordinary skill in the art at the time it was made, if not anticipated by the plants and seeds taught by each of Prasad et al and Norton et al.

16. Claims 67-73 are rejected under 35 U.S.C. 102(a) as anticipated by or, in the alternative, under 35 U.S.C. 103 as obvious over Zuniga et al (1999, Plant Dis. 83:1105-1107).

The plants of the instant application, NY 01-190-3R, -7L, -9L, and the plants taught by Zuniga et al have the same trait, resistance to gummy blight (see Table 2). Thus, the NY 01-190-3R, -7L, -9L plants appear to be identical to the prior art plants.

Alternatively, if the claimed plants, seeds and tissues of the instant invention are not identical to the plants and seeds taught by Zuniga et al, then it appears that the plants and seeds taught by Zuniga et al only differ from the claimed plants and seeds due to minor morphological variation, wherein said minor morphological variation would not confer a patentable distinction to NY 01-190-3R, -7L, -9L plants. Thus, the claimed invention was *prima facie* obvious as a

Art Unit: 1638

whole to one of ordinary skill in the art at the time it was made, if not anticipated by the plants and seeds taught by Zuniga et al.

***Conclusion***

17. No claim is allowed.

18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anne R. Kubelik, whose telephone number is (703) 308-5059. The examiner can normally be reached Monday through Friday, 8:30 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Amy Nelson, can be reached at (703) 306-3218. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to Customer Service at (703) 308-0198.

Anne R. Kubelik, Ph.D.

March 31, 2003

A handwritten signature in cursive script, appearing to read "Anne R. Kubelik", written in dark ink.